(9)

Supreme Court, U.S.
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No. 98-8384

In The

Supreme Court of the United States

TERRY WILLIAMS,

Petitioner,

v.

JOHN B. TAYLOR, WARDEN, SUSSEX I STATE PRISON,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF RESPONDENT

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QUESTIONS PRESENTED

1. Did the Fourth Circuit correctly conclude that the plain meaning and intent of 28 U.S.C. § 2254(d), as amended by the Antiterrorism and Effective Death Penalty Act of 1996, prohibits the granting of federal habeas corpus relief unless the state court decision adjudicating the claim on the merits is "contrary to" the "clearly established precedent" of this Court or involves an objectively "unreasonable" application of such precedent to the facts of a given case?

2. Did the Fourth Circuit correctly define "objective unreasonableness" in terms of a state court decision "interpreting or applying the relevant precedent in a manner that reasonable jurists would all agree was unreasonable?"

3. Did the Fourth Circuit correctly determine that the Virginia Supreme Court reasonably applied *Strickland v. Washington* and *Lockhart v. Fretwell* in finding that Williams failed to demonstrate that he was prejudiced by defense counsel's alleged errors?

4. Did the Fourth Circuit properly reject Williams' proposed revision of *Strickland* that would permit a finding of prejudice based upon the assumption that any jury includes at least one sympathetic juror who may be persuaded to hold out for a life sentence thereby preventing the jury from reaching a sentencing decision?

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STATEMENT OF THE CASE

A. The Crime, Trial and Direct Appeal

Shortly before 2:00 a.m. on Sunday, November 3, 1985, Harris Thomas Stone was found dead on his bed in his residence on Henry Street in Danville, Virginia. There was no sign of a struggle. Stone was fully clothed and no blood was observed on his body. Stone customarily kept his wallet inside his back pants pocket. The police and Stone's relatives thoroughly searched the house, but never found the wallet. The cause of Stone's death initially was thought to be heart failure or alcohol poisoning. (JA 491-492).

Almost six months later, however, the Danville Chief of Police received an anonymous letter from a local jail inmate admitting killing "that man Who Die on Henry Street." (JA 41, 492). The police interviewed Terry Williams, then confined in the Danville jail, and Williams admitted writing the letter. (JA 42, 62, 104). Williams confessed to robbing and killing Stone, as well as other crimes he had committed in Danville over a six-month period. (JA 1-2, 42, 44-45, 50-51, 69-70, 77-78).

Williams lived near Stone's Henry Street home. In his April 25, 1986, statement to the police (JA 1), Williams said that he went to Stone's home "before Thanksgiving of last year." Stone was alone and had been drinking. Williams asked to borrow "a couple of dollars," but Stone refused. The men argued and Williams "just wanted to get back at him." Stone "laid back like he had passed out." Williams looked around Stone's house for "something to use." He found a butcher knife in the kitchen but "didn't want to use it." He then found a mattock in the bathroom and returned to where Stone was lying on his bed. In his confession, Williams stated:

> He was laying on his back. I took the mattock and hit him on the chest with it. He raised up

> and was gasping for breath. He fell over to his side and I hit him on the chest with it. He raised up and was gasping for his breath. He fell over to his side and I hit him in the back with the mattock. He fell back on the bed. I went and put the mattock back in the bathroom. I came back into the room. I took his wallet from his pocket. He had three dollars in it. I got the three dollars from it. I left him there. He was still gasping for breath. I walked across Main Street bridge. I threw the wallet over the bridge into the river.

(JA 1-2).[1]

After Williams confessed, Stone's body was exhumed and an autopsy disclosed that Stone's ribs were fractured on the left side of his chest, puncturing and causing blood to collect in Stone's left lung. The cause of death was determined to be "a blunt force injury to the chest." (JA 393, 433). Williams was charged with Stone's murder.

On September 29 and 30, 1986, Williams was tried by a jury and convicted of capital murder and robbery. In a separate sentencing proceeding on September 30, the Commonwealth presented evidence of William's prior adult criminal convictions and of other offenses contemporaneous with the murder of Harris Stone. Williams had been convicted of armed robbery in 1976. In 1982, Williams was convicted of burglary and grand larceny. The victim of the latter offenses testified that Williams fought with him after the victim interrupted the crime in progress. (JA 26-27). Williams was paroled in April of 1985.

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[1] On Monday, April 28, 1986, Williams told police that he had spoken with his family over the weekend, and that Williams' mother told him he had "dreamed" of committing the murder. (JA 5, 64). On May 2, 1986, however, Williams confirmed the truth of his original April 25 confession. He corrected minor details in the original statement. (JA 5-7, 66, 80, 83).

After the murder of Stone in November of 1985, Williams committed two auto thefts and two separate violent assaults on elderly African-American victims. (JA 50-51, 69-70, 77-78). While awaiting trial in this case, Williams was convicted of arson for setting a fire in the jail. (JA 79). Williams also had made statements to a police officer concerning his thoughts about violent assaults on other jail inmates. (JA 80-81).

The prosecution presented Williams' confession to a December 4, 1985, assault and robbery of an elderly man, William Solomon, who lived near Williams' home. (JA 62). At approximately 3:30 in the morning, Williams gathered some clothing from a rack outside Solomon's residence, set the clothes on fire, and placed the burning clothes next to Solomon's door. Williams waited until Solomon opened the door and then pretended to help put out the fire. Williams went to the kitchen to retrieve water, but returned with a small knife which he used to stab Solomon in his side. He then took $52 from Solomon's pocket. (JA 69-70, 75).

Williams also had confessed to the brutal beating of 70-year-old Alberta Stroud. On the evening of March 5, 1986, Stroud was found lying on Green Street in Danville. She was unconscious and had lost "a tremendous amount of blood." (JA 33-34). Her dress had been pulled up and her underwear was wrapped around her ankles. (JA 34). She had been beaten severely causing bruising of her face, facial fractures, brain injury, and internal bleeding. (JA 38, 105-106). As a result of the damage to her brain, Stroud was left in a "vegetative state," from which she would never improve. (JA 38-39, 60-61). She was alive at the time of Williams' trial, but later died. (JA 221).

Williams told the police that he encountered Stroud walking and thought that she "said something bad or cursed me." (JA 45).

> Then I just knocked her down with my hand. When she was down I started hitting her and kicking her over and over again. I then pulled her dress up and pulled her panties down. I then started hitting on her again. She kept saying, "Stop. Please Stop."

(JA 45). According to Williams, the attack ceased only when he "got scared" and left. (JA 51).

The Commonwealth also presented expert testimony concerning Williams' mental health based on evaluations conducted at Central State Hospital. Dr. Miller Ryans, a forensic psychiatrist, testified that Williams was not mentally ill and did not have any emotional problems. Williams functioned on a "borderline level of intellectual functioning, which is between mild mental retardation and low normal intellectual level." (JA 86). After reviewing Williams' past record, particularly the prior armed robbery conviction, Dr. Ryans concluded that there was "a high probability that [Williams] would commit criminal acts of violence, and that he constitutes a continuing threat, a serious threat to society." (JA 89). Dr. Arthur Centor, a clinical psychologist, testified that his testing of Williams disclosed no mental illness or defect. (JA 96). Neurological testing also failed to suggest any disorder. (JA 97). Williams' claim that he had only dreamed about the crimes was "malingered," and testing failed to substantiate Williams' claim that "things came over him over which he had no control." (JA 97). Dr. Centor found that Williams showed "a high probability" of dangerousness based on his history and frequency of violent offenses. (JA 100).

Williams' trial attorneys presented the testimony of a forensic psychiatrist appointed by the trial court to assist the defense, two character witnesses, and Williams' mother. Dr. Paul Mansheim testified concerning Williams' statements about his prior convictions. Williams reported

to Mansheim that he removed the bullets from the gun he used to commit the robbery in 1976, "to make sure no one got hurt." (JA 110). Williams also claimed that he was wrongfully convicted of burglary and grand larceny in 1982 because he supposedly was merely helping a friend move furniture. (JA 111). Dr. Mansheim was not asked and did not offer an opinion as to Williams' dangerousness. Dorothy Moore, a minister and friend of Williams, testified that Williams was "very respectable" and that she had not known him to be violent. (JA 114-115). Deborah Grant, a friend of Williams for eleven years, also described Williams as nonviolent. (JA 119-121). Both character witnesses were cross-examined by the prosecutor about their knowledge of Williams' prior convictions. (JA 116-117, 122-123). Lulu Williams, the petitioner's mother, testified that Williams was a "nice boy" who never hurt or threatened any person in her presence, or to her knowledge. (JA 124). She stated that she could not believe that Williams committed these crimes and that "he must have been dreaming." (JA 128).

The jury deliberated for only one hour before returning a death sentence based upon the finding of a probability that Williams would commit acts of violence that would constitute a continuing serious threat to society. (JA 150; Tr. 9/30/86, p. 703). After considering the probation officer's report, the trial court sentenced Williams to death on November 19, 1986. (JA 154-155).

The Supreme Court of Virginia unanimously affirmed the convictions and death sentence on direct appeal. *Williams v. Commonwealth*, 360 S.E.2d 361 (Va. 1987). This Court denied certiorari on January 11, 1988. *Williams v. Virginia*, 484 U.S. 1020 (1988).

B. The State Habeas Corpus Proceedings

Williams' initial habeas corpus petition was filed in the Danville Circuit Court on August 26, 1988. More than six years later, an amended petition was filed on April 24, 1995, and the circuit court held an evidentiary hearing on Williams' ineffective counsel claims on June 15-16, 1995.[2] On August 15, 1996, the court filed its Findings of Fact and Recommended Conclusions of Law (JA 382-429) concluding that trial counsel were effective in all circumstances of the trial but one: according to the state habeas court, trial counsel's failure to present certain mitigating evidence at sentencing warranted relief. (JA 424). Specifically, the circuit court found that the following evidence was available at the time of Williams' trial but had not been presented (JA 423): a report in petitioner's records from a juvenile commitment to Beaumont Correctional Center (JA 523-547), and statements from Williams' siblings (JA 322-323, 330-335, 576-585), describing conditions in the Williams' household during Williams' youth; and the possible testimony of Williams' wife (JA 573-574), 11-year-old daughter (JA 571), and Williams' friend Bruce Elliott.[3] (JA 563-566).

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[2] In 1995, the Virginia General Assembly amended the state habeas statute to vest exclusive jurisdiction in the Virginia Supreme Court with respect to petitions filed by prisoners under sentence of death. Va. Code § 8.01-654(C)(1). Jurisdiction over Williams' petition, which was filed in the circuit court prior to the change in law, was transferred to the Supreme Court on July 1, 1995. That court then directed the circuit court to report its findings of fact and recommended conclusions of law regarding the ineffective counsel claims that had been the subject of the June 1995 evidentiary hearing. (JA 430-432).

[3] Williams did not call these last three individuals to testify at the 1995 evidentiary hearing, so they were not cross-examined. Their testimony merely had been proffered by

The Beaumont records consisted of 47 pages of documents concerning Williams' incarceration as a juvenile. (JA 523-547). Williams was committed to the juvenile system for the first time when he was 11 years old, for aiding and abetting larceny. He was committed again when he was 12 for making a false fire alarm. In 1971, when he was 15, he was committed for three counts of breaking and entering. (JA 534-536; Pet. Ex., Vol. VII, Ex. C. No. 40 at 13). He remained under the authority of the juvenile authorities until he reached age 21. (JA 540).

Included in the juvenile records was a November 1967 report concerning Williams' home life, which discussed events that occurred 10 years earlier when Williams was an infant. (JA 528-533). In 1957 Terry Williams and four other Williams children were removed from their parents' custody because they had allowed the children to become intoxicated on bootleg whiskey, and had failed to take care of their children due to their own drinking. Williams' parents were convicted and jailed for neglecting the children. (JA 528-529).

According to the report, however, by 1967 Williams' father had forsaken excessive drinking and bootlegging. (JA 531). The father also was "regularly employed," "cooperative with the Court," "shows a genuine interest in his children," and "great concern over his family when they get involved in trouble." Mrs. Williams had "a great love and interest in her children but due to her limitations she seems to be ineffectual in disciplining them." (JA 531). According to the report, Williams' parents "always try to be cooperative and they say that they try to keep close touch on Terry but he just seems to slip away and go about the neighborhood doing as he

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affidavit. Williams' mother and brother testified at the habeas hearing about petitioner's upbringing. (JA 318-339).

pleases." (JA 530). The report also summarized Williams' early involvement with the juvenile authorities: an incident involving malicious property damage at age 8; bicycle theft in 1966; and disorderly conduct, malicious damage, burglary, and larceny charges in 1967. (JA 530-531).

Four of Williams' siblings submitted affidavits describing Williams' childhood and the beatings he allegedly received from his father when he did something wrong. (JA 576-585). According to these affidavits, Williams' father was stricter with Williams than with his other children. (JA 580). Williams' family thought he was not a "violent person." (JA 576, 579, 583, 584).[4]

Williams' daughter, who had been 11 years old at the time of trial, offered an affidavit that described Williams as "a good daddy," for the three years of her life that he was not imprisoned. (JA 571). Williams' ex-wife's affidavit described the three years (1973-1976) she had been married to Williams. (JA 573).

Finally, the state habeas judge noted an affidavit from Bruce Elliott, an accountant who had met Terry Williams

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[4] Prior to trial, defense counsel had asked Williams and his family "to tell us anything or anyone who could possibly help Terry or provide us with any information." (JA 208, 227, 235-236). Counsel used what little information was provided. (JA 208). Mrs. Williams, moreover, did not suggest in her trial testimony that petitioner was abused as a child or that he was raised in an alcoholic background. (JA 124-128). She gave no such information to defense counsel when she was asked before trial for any information that could help Williams. (JA 227, 235, 324-329). The affidavits of Williams' brothers and sisters did not claim that any of them ever advised defense counsel before trial of any abuse of Williams by his father. (JA 576-585). According to Williams' trial counsel, "every indication we had [from the family] was that they had tried to provide Terry with a good, loving stable Christian home." (JA 235).

in 1978 while Williams was incarcerated for his 1976 conviction for robbery. (JA 563-566). Elliott had been involved in a local church's prison ministry program and saw Williams frequently. Elliott stayed in contact with Williams after he was transferred to a different correctional unit, and while Williams was on parole. (JA 563-564). Elliott's affidavit stated that he would have testified that Williams was proud of his accomplishments in prison, and that he was mild mannered, not aggressive. (JA 564).

Williams' trial attorneys acknowledged that they generally had been unaware of the evidence Williams had proffered at the state habeas hearing. They had presented character witnesses at trial to show that Williams had some redeeming qualities, but the effort had provided opportunities for the prosecutor to remind the witnesses, and the jury, of Williams' violent criminal history. (JA 245-246). Defense counsel knew of other witnesses who could testify for Williams, but decided against presenting additional character testimony.[5] (JA 245-246). ***The state habeas judge expressly found that counsel made a tactical decision to avoid additional character witnesses and thereby deny the Commonwealth additional opportunities to reemphasize Williams' criminal record,*** but concluded that some testimony should have been offered ***"for whatever it was worth."*** (JA 400-401, emphasis

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[5] Defense counsel obtained the assistance of a court-appointed psychiatrist, and also discussed the case with one of the Commonwealth's mental health experts. (JA 193-194, 222-223, 231-232). Defense counsel knew that Williams did not have a steady job history or any positive evidence from his life in Danville. (JA 221). As a matter of strategy, defense counsel determined that it would be in Williams' best interests to ask the jury for mercy, relying on his confession and assistance to the police as evidence of his remorse. (JA 221, 222).

added). The circuit court recommended that the writ issue to grant Williams a new sentencing. (JA 424).

Both Williams and the Warden filed objections in the Virginia Supreme Court to the state habeas judge's findings and recommendations. On January 13, 1997, the Virginia Supreme Court ordered briefing and argument on the one issue that the circuit court found warranted relief, and accepted the lower court's recommended dismissal of all other claims. On June 6, 1997, the Virginia Supreme Court unanimously rejected the circuit court's recommendation for sentencing relief, and denied the writ. *Williams v. Warden*, 487 S.E.2d 194 (Va. 1997). (JA 430-444). The Court ruled that the state habeas judge's recommendation was based on an erroneous, "per se" understanding of *Strickland* prejudice. The circuit court had concluded that "mitigating evidence is absolutely crucial and if none is offered, this amounts to prejudice" (JA 444), and that Williams' defense needed "anything and everything that might be available as favorable evidence," and "[a]nything less was not enough." (JA 444). The Virginia Supreme Court expressly found that Williams' "assertions about the potential effects of the omitted proof do not establish a 'reasonable probability' that the result of the proceeding would have been different, nor any probability sufficient to undermine confidence in the outcome." (JA 441).

C. The Federal Habeas Proceedings

On September 29, 1997, the United States District Court for the Eastern District of Virginia stayed Williams' execution and appointed federal habeas counsel. Williams' petition was filed on December 12, 1997, and on April 7, 1998, the district court ordered that his death sentence be vacated based upon the same ineffective counsel claim upon which the state habeas judge had

relied. (JA 464-477). The remaining allegations of the petition were dismissed. (JA 445).

On December 18, 1998, the United States Court of Appeals for the Fourth Circuit reversed the district court's order granting the writ, finding that Williams' ineffective counsel claim did not merit relief and that the Virginia Supreme Court's rejection of Williams' claim was neither contrary to, nor an unreasonable application of, clearly established precedent of this Court. *Williams v. Taylor*, 163 F.3d 860, 869-870 (4th Cir. 1998). (JA 489-520). The Fourth Circuit affirmed the district court's dismissal of Williams' remaining claims. Williams' petition for rehearing was denied on January 15, 1999.

On February 10, 1999, as required by Virginia Code § 53.1-232.1(iii), the Danville Circuit Court set Williams' execution for April 6, 1999. Williams filed his petition for a writ of certiorari in this Court on March 5, 1999. On April 2, 1999, this Court stayed Williams' execution, and subsequently granted Williams' certiorari petition on April 4, 1999.

SUMMARY OF THE ARGUMENT

One of the most important aspects of the federal habeas corpus reforms embodied in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") is Congress' amendment of 28 U.S.C. § 2254(d). The amended statute creates a general rule prohibiting federal collateral relief on the basis of any claim that the state court decided on the merits, subject only to narrow exceptions for decisions which are "contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States," or which are based on an "unreasonable determination" of the facts. As this Court recognized in *Lindh v. Murphy*, 521 U.S. 320, 334 (1997), the present

version of § 2254(d) provides a "highly deferential standard for evaluating state court rulings."

In a tactic driven by the inherent weakness of his underlying ineffective counsel claim, Williams proposes an interpretation of § 2254(d) that would avoid giving any deference to the reasonable decision of the Virginia Supreme Court that he had failed to demonstrate the "prejudice" required under *Strickland v. Washington*, 466 U.S. 668 (1984). Ignoring Congress' clear intent to reform and curb federal habeas review of state court decisions, he argues that § 2254(d) as amended leaves intact the prior rule of de novo review. According to Williams, Congress "codified" the anti-retroactivity rule of *Teague v. Lane*, 489 U.S. 288 (1989), but otherwise failed to change the law in any significant respect. His reading of the statute, however, cannot be reconciled with either the statute's text or Congress' expressed intent to create a "highly deferential" standard of review.

Amended § 2254(d) builds upon *Teague*'s goal of validating a state court's reasonable interpretations and applications of this Court's precedents, but Congress did not merely codify *Teague*. Rather, the clear intent of Congress, as expressed by the plain meaning of the text of § 2254(d) and demonstrated by its unambiguous legislative history, was to prohibit federal habeas relief when the state court reasonably identified and applied this Court's clearly established precedent.

The Fourth Circuit correctly upheld the Virginia Supreme Court's reasonable application of *Strickland*'s clearly established "prejudice" standard. Williams was afforded a full and fair evidentiary hearing in the state court, and the Virginia Supreme Court unanimously, and reasonably, determined that he had failed to demonstrate that, absent his trial counsel's alleged errors, there was a reasonable probability that the jury's sentencing verdict

would have been different. The Fourth Circuit also determined correctly that the state court's reasonable finding of no *Strickland* prejudice was not rendered unreasonable by virtue of the state court's additional finding that Williams' trial was fair and his sentence reliable. Williams' claim that the Virginia Supreme Court erred by referring to this Court's decision in *Lockhart v. Fretwell*, 506 U.S. 364, 369 (1993), not only mischaracterizes the state court's decision, but fails to recognize *Strickland* and *Fretwell*'s common emphasis upon the core value protected by the Sixth Amendment's right to effective counsel: the reliability of the factfinder's decision.

Williams asks this Court to recast *Strickland*'s "prejudice" inquiry in terms of whether there is a reasonable probability that at least one juror would have held out for a life sentence thereby preventing the jury from reaching a sentencing decision. This Court, however, never has held or even suggested that *Strickland* prejudice may be measured by speculation about the hypothetical propensities of individual jurors or that the Sixth Amendment somehow protects a criminal defendant's supposed interest in a jury's inability to reach a verdict. To the contrary, *Strickland* itself expressly held that, in the context of a capital sentencing proceeding, the "reasonable probability" test focuses upon the likelihood that, in the absence of counsel's alleged errors, the factfinder would have decided to impose a life sentence rather than a death sentence. The Fourth Circuit thus correctly concluded that Williams' proposed "one juror" standard simply cannot be reconciled with the objective inquiry mandated by *Strickland*, and this Court should reject Williams' attempt to eviscerate *Strickland*'s purposefully stringent standard for assessing whether a petitioner is entitled to relief on the basis of his own counsel's alleged errors or omissions.

ARGUMENT

Consistent with his argument that 28 U.S.C. § 2254(d) has not altered, in any significant way, federal collateral review of a state prisoner's claims for relief, Williams first addresses the merits of his ineffective counsel claim, concludes that he is entitled to relief and only then discusses whether the standard mandated by Congress permits such de novo review. Williams has it backwards. Section 2254(d) presents federal habeas courts with a threshold question that governs whether the state prisoner will be entitled to relief, a question that should be decided first, not last. *See generally Collins v. Youngblood*, 497 U.S. 37, 40-41 (1990) (*Teague* question presents threshold matter in collateral review).

I. SECTION 2254(d) CREATES A "HIGHLY DEFERENTIAL" STANDARD OF REVIEW WHICH PROHIBITS FEDERAL HABEAS CORPUS RELIEF UNLESS THE STATE COURT DECISION IS "CONTRARY TO," OR "AN UNREASONABLE APPLICATION OF," THIS COURT'S "CLEARLY ESABLISHED PRECEDENTS."

In enacting § 2254(d),[6] Congress generally prohibited the granting of federal habeas corpus relief on the basis

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[6] The statute now reads:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

of a claim that the state court adjudicated on the merits. This general rule is made subject to narrow exceptions where the state court adjudication of a prisoner's claim was either "contrary to, or involved an unreasonable application of, clearly established Federal law," as determined by this Court, or where the state court decision "was based upon an unreasonable determination of the facts."[7]

Congress' policy decision to prohibit federal habeas relief generally after state courts have determined the merits of a state prisoner's claim plainly abolishes the concept of de novo review which prevailed before AEDPA and which generally denied a state court's merits decision any legal effect in all but the "new rule" and Fourth Amendment cases.[8] As this Court explicitly has

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[7] Williams raises no question concerning the reasonableness of the state court's factual determinations. AEDPA strengthened the long-maintained presumption of correctness regarding state court factual findings. Section 2254(e)(1) reiterates the presumption, and stipulates that a petitioner may overcome the presumption only with "clear and convincing evidence." The eight former "exceptions" to the presumption have been abandoned.

[8] The courts of appeals have been unanimous that de novo review of a state prisoner's claims, in the sense that federal habeas relief may be granted on the basis of a federal court's simple disagreement with the state court decision rejecting a claim, has been replaced by § 2254(d)'s "highly deferential" standard of review. *See Long v. Humphrey*, ___ F.3d ___, 1999 U.S. App. LEXIS 15986, *8 (8th Cir. 7/14/99); *Matteo v. Superintendent*, 171 F.3d 877, 888, 890 (3rd Cir. 1999); *Nevers v. Killinger*, 169 F.3d 352, 361 (6th Cir. 1999); *O'Brien v. Dubois*, 145 F.3d 16, 25 (1st Cir. 1999); *Green v. French*, 143 F.3d 865, 870 (4th Cir. 1998), *cert. denied*, 119 S.Ct. 844 (1999); *Neeley v. Nagle*, 138 F.3d 917, 924 (11th Cir. 1998), *cert. denied*, 119 S.Ct. 811 (1999); *Drinkard v. Johnson*, 97 F.3d 751, 868 (5th Cir. 1996), *cert. denied*,

recognized, AEDPA instead provides a "highly deferential standard for evaluating state court rulings." *Lindh*, 521 U.S. at 334.

Congress thus has chosen to allocate to the state courts the primary responsibility for enforcing constitutional requirements in state criminal cases that have become final on direct appeal. State prisoners' opportunity for independent federal collateral review is reserved for the rare occasions where the state courts' decisions depart from this Court's clear statements of the Constitution's requirements. Congress has fixed that point of departure by reference to whether the state court's decision was "contrary to" or "involved an unreasonable application of" this Court's "clearly established" precedents. Given the ordinary meaning of the terms Congress chose, and the meaning of those terms as used by this Court in the context of federal collateral review of state court criminal judgments, it is clear that § 2254(d) now prohibits federal habeas relief when the state courts reasonably identify and apply this Court's precedents.

A. Prior to AEDPA, a federal habeas court generally reviewed a state prisoner's claims de novo, granting no deference to the state court decision.

At the time Congress enacted AEDPA, federal courts generally reviewed a state prisoner's claims that he was "in custody in violation of the Constitution or laws or treaties of the United States," 28 U.S.C § 2254(a), under a

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520 U.S. 1107 (1997); *Lindh v. Murphy*, 96 F.3d 856, 871 (7th Cir. 1996), *rev'd on other grounds*, 521 U.S. 320 (1997).

standard of review alternatively described as "independent," "de novo," or "plenary."[9] *See Townsend v. Sain*, 372 U.S. 293, 311-312 (1963) (using all three terms). Such review, however, was subject to both statutory and judicial limitations. The ability of a federal habeas court to revisit factual findings made by state courts was circumscribed by the "presumption of correctness" found in former § 2254(d), *see, e.g., Sumner v. Mata*, 449 U.S. 539 (1981), and § 2244(b) limited consideration of successive petitions. This Court's decisions also prohibited or limited collateral review for certain categories of claims. *See Stone v. Powell*, 428 U.S. 465 (1976) (federal habeas relief not available for Fourth Amendment claims where state has provided opportunity for full and fair litigation); *Coleman v. Thompson*, 501 U.S. 722 (1991) (federal relief generally precluded for claims barred by adequate and independent state law ground).

Moreover, in a series of cases beginning with *Teague v. Lane*, the Court set out its "new rule" doctrine further limiting the scope of federal collateral review.[10] In its most basic form, the *Teague* doctrine prevents federal

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[9] The precise point in time when de novo review became the rule for federal collateral review of state court convictions has been debated, *see Wright v. West*, 505 U.S. 277, 285-288 (1992) (Thomas, J.), and *id.* at 297-298 (O'Connor, J., concurring), but the concept of de novo review certainly had been accepted at least since *Brown v. Allen*, 344 U.S. 443, 458-465 (1953). *See West*, 505 U.S. at 289 n.6. (Thomas, J.).

[10] *See also Penry v. Lynaugh*, 492 U.S. 302 (1989); *Butler v. McKellar*, 494 U.S. 407 (1990); *Saffle v. Parks*, 494 U.S. 484 (1990); *Sawyer v. Smith*, 497 U.S. 227 (1990); *Stringer v. Black*, 503 U.S. 222 (1992); *Wright v. West, supra; Graham v. Collins*, 506 U.S. 461 (1993); *Gilmore v. Taylor*, 508 U.S. 333 (1993); *Caspari v. Bohlen*, 510 U.S. 383 (1994); *Gray v. Netherland*, 518 U.S. 152 (1996); *Lambrix v. Singletary*, 520 U.S. 518 (1997); *O'Dell v. Netherland*, 521 U.S. 151 (1997).

habeas courts from reversing a state court judgment based on precedent decided after the state prisoner's case became final on direct appeal, or from creating or applying such "new rules." In the absence of an "old rule" sufficiently specific to require its application by the state court, the state court's reasonable interpretation of existing precedent must be upheld, subject only to two narrow exceptions.[11] "The 'new rule' principle therefore validates reasonable, good faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions." *Butler*, 494 U.S. at 414.

In *West*, the Court debated, but ultimately did not decide, whether *Teague*'s goal of "validat[ing]" reasonable state court interpretations of precedent should be extended to review of state court decisions involving the application of law to fact. *See West*, 505 U.S. at 289-291 (Thomas, J.) (questioning de novo review of "mixed legal questions;" under *Teague*, "federal habeas court 'must defer to the state court's decision rejecting the claim unless that decision is patently unreasonable.' "); *id.* at 304 (O'Connor, J., concurring) ("In *Teague*, we refused to give state prisoners the benefit of new rules of law, but we did not create any deferential standard of review with regard to old rules"); *id.* at 307 (Kennedy, J., concurring) (*Teague* rule not in conflict with de novo review of mixed questions and "did not establish a deferential standard of review of state-court decisions of federal law"). Thus, the end result of *West* was to leave the "new rule" doctrine

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[11] *Teague* recognized exceptions for a "new rule" that places "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe," or "requires the observance of those procedures that . . . are implicit in the concept of ordered liberty." 489 U.S. at 311 (citation omitted).

firmly in place as to pure questions of federal law, but to defer to Congress on the issue of whether de novo habeas review should be abolished regarding applications of established rules to the facts of particular cases. As Justice O'Connor concluded, for the Court to effect such a change would be "far-reaching" in light of this Court's precedents and Congress' previous rejections of a deferential standard of review. *See West*, 505 U.S. at 305-306 (O'Connor, J., concurring). Congress now has acted, however, and clearly has mandated the type of deference to state court determinations of mixed questions of law and fact that *West* declined to mandate.

B. The general prohibition of relief under § 2254(d) evinces Congress' intent to create a rule of deference to state court applications of federal law.

This Court previously has recognized that AEDPA created a "highly deferential standard for evaluating state court rulings." *Lindh*, 521 U.S. at 334. In clear and unmistakable terms, Congress now has mandated the general rule that a state court "decision" on all issues "adjudicated on the merits," must be upheld by a federal habeas court, unless certain narrow exceptions are found. *See* § 2254(d) ("An application for a writ of habeas corpus . . . ***shall not be granted*** . . . unless . . . ."). When interpreting an act of Congress, this Court's first responsibility is to view the language Congress used as the most reliable indication of intent. *See Holloway v. United States*, 119 S.Ct. 966, 969 (1999). There can be no doubt that Congress' intent in enacting AEDPA was to limit the availability of federal relief, and the general prohibitory language employed by Congress refutes any argument that federal habeas courts still retain the authority to grant relief merely because they disagree with a state

court's decision on a matter of federal law.[12] By declaring that federal collateral relief generally "shall not be granted," Congress has mandated deference to the decisions of state courts in all but the exceptional cases which are narrowly defined in § 2254(d)(1) and (2).

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[12] Williams argues that interpreting § 2254(d) to create a deferential standard of review would raise a potential constitutional conflict because Article III judges are obligated to independently determine constitutional questions. (Pet. Br. at 43-48). This Court, however, specifically refused review of Williams' question 4 presented in his certiorari petition which raised the identical argument. (Pet. Cert. at 32). Moreover, Williams presented his constitutional argument in the court below only in the most "cursory fashion," leading the Fourth Circuit to question whether the issue even was "properly" before the court. (JA 498). This Court should not allow Williams to smuggle his defaulted claim back into the case. In any event, Congress' express limitations on the availability of the habeas *remedy* are little different from the judicially-imposed limitations that existed prior to AEDPA without valid constitutional objection. *See, e.g., Stone v. Powell, supra; Wainwright v. Sykes*, 433 U.S. 72 (1977); *Coleman v. Thompson, supra; Teague v. Lane, supra*. Indeed, even under Williams' view of § 2254(d), an Article III court still is denied the power to review de novo a "reasonable application" of law. Congress has made the state courts the primary and, in most cases final, arbiter of federal claims challenging state court criminal judgments. *See Felker v. Turpin*, 518 U.S. 651, 664 (1996) ("judgments about the proper scope of the writ are 'normally for Congress to make' "), *quoting Lonchar v. Thomas*, 517 U.S. 314, 323 (1996). *See generally* Kent S. Scheidegger, *Habeas Corpus, Relitigation, and the Legislative Power*, 98 Columbia L. Rev. 888 (1998). Congress clearly trusts the state courts to be up to the task, just as this Court has recognized that state courts are "coequal parts of our national judicial system and give serious attention to their responsibilities for enforcing the commands of the Constitution." *Sawyer v. Smith*, 497 U.S. at 241. *See also Brecht v. Abrahamson*, 507 U.S. 619, 636 (1993).

C. A federal court may grant habeas relief only if the state court decision is "contrary to or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States."

The terms "contrary to" and "unreasonable application of" both describe a degree of conformity and consistency with prior decisions. *See Green*, 143 F.3d at 870; *Matteo*, 171 F.3d at 891. In choosing these terms, Congress specified the degree to which a state court decision must depart from this Court's precedents to warrant the exceptional intervention into the state's criminal processes represented by the granting of federal collateral relief. All courts of appeals that have addressed the meaning of § 2254(d)'s exceptions have agreed that Congress intended federal courts to retain the authority to invalidate state court decisions under a "contrary to" analysis only if this Court's precedents required the state courts to apply a specific rule and produce a specific result, and the state court nevertheless reached a "contrary" conclusion. And, decisions involving a state court's application of this Court's clearly-established precedents to the particular facts of a prisoner's case – mixed questions of law and fact – can be reviewed only for "an unreasonable application of" such precedent.[13]

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[13] *See Matteo*, 171 F.3d at 888-891 ("contrary to" applies if controlling precedent requires outcome contrary to state court decision; "unreasonable application" objectively determines whether application of precedent to facts produces outcome not justified under reasonably existing precedent); *Nevers*, 169 F.3d at 360-361 (in absence of clear Supreme Court rule requiring certain result, state decision not "contrary to" precedent; decisions on mixed questions "unreasonably apply" precedent if no reasonable jurists would agree with result); *O'Brien*, 145 F.3d at 24-25 ("contrary to" addresses decisions where Supreme

1. "Clearly established Federal law, as determined by the Supreme Court of the United States," establishes a deferential standard of review.

By requiring that a state court's decision be measured against "clearly established Federal law, as determined by the Supreme Court of the United States," Congress imposed two distinct limitations upon federal habeas review. First, by specifying that state courts are obliged to follow *this Court's* precedents, Congress made abundantly clear that state court decisions cannot be overturned merely on the basis of precedent from the lower federal courts. This limitation is firmly grounded in the principles of federalism which in recent years this Court has brought to the forefront of federal collateral review. *See Lockhart v. Fretwell*, 506 U.S. at 376 (Thomas, J., concurring) ("The Supremacy Clause demands that state law yield to federal law, but neither federal supremacy nor any other principle of federal law requires that a state court's interpretation of federal law give way to a (lower) federal court's interpretation."); *Caspari*, 510 U.S. at 395 (1994) ("Constitutional law is not the exclusive province

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Court rule governs claim and requires particular outcome; "unreasonable application" refers to state court's objectively reasonable application of rule to factually different circumstances); *Green*, 143 F.3d at 869-870 ("contrary to" applies to questions of law or case of "square conflict;" "unreasonable application refers to application of precedent to facts); *Neeley*, 138 F.3d at 923-924 ("contrary to" applies when Supreme Court precedent compels particular result; "unreasonable application" refers to mixed questions); *Drinkard*, 97 F.3d at 767-768 ("contrary to" refers to errors of pure law, "unreasonable applications" to mixed questions); *Lindh*, 96 F.3d at 869-870 (federal courts have independent authority to determine issues of federal law but must uphold reasonable decisions of state court on mixed questions).

of the federal courts, and in the *Teague* analysis the reasonable views of the state courts are entitled to consideration along with those of federal courts.")

Just as importantly, "clearly established Federal law" is a term of art with a settled and specific meaning that Congress clearly borrowed from this Court's qualified immunity and *Teague* cases. In the context of federal civil rights actions, public officials' liability for money damages is limited "insofar as their conduct does not violate *clearly established statutory or constitutional rights* of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (emphasis added). The availability of immunity "turns on the 'objective legal reasonableness' of the action, assessed in light of the legal rules that were 'clearly established' at the time" of the conduct. *Wilson v. Layne*, 119 S.Ct. 1692, 1699 (1999), *quoting Anderson v. Creighton*, 483 U.S. 635, 639 (1987). The "clearly established" determination requires an assessment of the "level of generality at which the relevant 'legal rule' is to be established," which means:

> the contours of the right must be sufficiently clear that a reasonable officer would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful; but it is to say that in light of preexisting law the unlawfulness must be apparent.

Wilson, 119 S.Ct. at 1699, *quoting Anderson*, 483 U.S. at 640.

This Court, moreover, expressly has linked *Anderson*'s definition of "clearly established" law to *Teague*'s "new rule" analysis. *See Sawyer*, 497 U.S. at 236 (relying on *Anderson* test to assess level of generality of clearly

established law); *West*, 505 U.S. at 313 (Thomas, J.) (prisoner must be able to show "in light of authority extant when his conviction became final [that] its unlawfulness was apparent").

The *Teague* analysis asks whether the prisoner seeks the benefit of a "new rule," one not "dictated" or "compelled" by existing precedent, and requires a "survey of the legal landscape" to determine if "the unlawfulness of [the prisoner's] conviction was apparent to all reasonable jurists" at the time the prisoner's conviction became final on direct appeal. *See Lambrix*, 520 U.S. at 527-528. *Teague*'s concept of "dictated by precedent" thus parallels and essentially replicates *Anderson*'s "clearly established" requirement. Both inquiries serve the same purpose of defining the state of the law at the relevant time, and both require a degree of specificity in the existing rule before the availability of a remedy may be determined on an objective standard of reasonableness.

By stressing that § 2254(d)(1)'s exception applies only when the state court's decision is "contrary to clearly established Federal law," Congress selected a standard of review far more limited than "de novo," "independent" or "plenary" review.[14] Rather, the alleged departure from

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[14] The Federal Magistrate Act, 28 U.S.C. § 636, and Rule 72, F.R. Civ.P., both make a clear distinction between "clearly erroneous or contrary to law," *see* 28 U.S.C. § 636(b)(1)(A), Rule 72(a), and "de novo." *See* § 636(b)(1)(c), Rule 72(b). Congress thus unquestionably understands "clearly erroneous or contrary to law" to constitute a more circumscribed standard of review than "de novo." *See Gomez v. United States*, 490 U.S. 858, 874 (1989) (describing "clearly erroneous or contrary to law" as "less stringent" than de novo review). To the extent that "contrary to law" has been interpreted in the context of a superior court's review of an *inferior* court's legal conclusions, it

the requirements of this Court's established precedents must be so starkly unreasonable as to make the "unlawfulness" of the state court decision "apparent" before a state court decision can be considered "contrary to" the controlling rule.

2. "Contrary to" focuses on the state court's identification of the governing rule.

The *Teague* cases clearly demonstrate this Court's understanding of the term "contrary to precedent" in the context of federal collateral review. *Teague* requires that the federal habeas court determine whether the rule the state prisoner is seeking is "old" or "new" and, if the rule the prisoner seeks was not "dictated by precedent" at the time his conviction became final on direct appeal, it is "new." The state court's failure to identify and apply "new" rules will not result in the granting of federal collateral relief if in doing so the court reasonably interpreted existing precedent. *Teague* thus "validates" a state

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obviously has no application to a lower federal court's collateral review of the decision of a coequal state court, which more closely resembles a court's review of an agency decision. An agency's interpretation of the law governing its actions, when that agency has been vested with "primary and substantial responsibility for administering and enforcing" the law, is entitled to deference by the reviewing court. *Federal Election Commission v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 37 (1981). Indeed, the agency's action is not "contrary to law if it is sufficiently *reasonable* to be accepted." *Id.* at 39 (emphasis added). *See also Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-843 (1984) (setting out principles for judicial review of agency decision when Congress has spoken to precise issue and when agency must construe statute).

court's reasonable, good-faith interpretations of precedent, "even though they are shown to be *contrary to later decisions.*" *Butler*, 494 U.S. at 414 (emphasis added). By definition, the state court's decision in that circumstance was not "contrary to" existing precedent when the state court ruled. A state court, however, is not free to ignore "old rules" – this Court's "clearly established" precedent – and the failure to select and apply an "old rule" that represents "clearly established Federal law" renders the state court decision "contrary to" precedent.[15]

Williams argues that limiting the "contrary to" exception to the state court's selection of the appropriate rule creates an "empty category" of cases because state courts

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[15] The Fourth Circuit's interpretation of § 2254(d) also would find a decision to be "contrary to precedent" if the application of the rule to the particular facts of a state prisoner's case was so "unreasonable" as to render the decision intolerably inconsistent with precedent. Thus a state court may not, after identifying the correct legal standard, apply the rule to facts "indistinguishable in any material respect," and reach the opposite result as the precedent. *See Green*, 143 F.3d at 869. And, a state court may not apply existing precedent in a different factual context where it is "indisputably unjustified," or fail to apply precedent where the precedent's principle clearly does apply. *Id.* This "rule identification" analysis also finds parallels in the "new rule" analysis. *See Penry*, 492 U.S. at 314 (distinguishing whether rule is new or simply applies well established principle to govern analogous case); *Butler*, 494 U.S. at 414 (rejecting argument that claim was merely application of "old" rule to new facts); *West*, 505 U.S. at 304 (O'Connor, J., concurring) (*Teague* inquiry asks "whether case under consideration is meaningfully distinguishable" from prior precedent); *Stringer*, 503 U.S. at 228 (principles "underlying our new rule jurisprudence may be undermined to an equal degree by the invocation of a rule that was not dictated by precedent as by the application of an old rule in a manner that was not dictated by precedent").

are unlikely to choose incorrectly or misstate the appropriate rule.[16] Williams certainly is right to be confident that the state courts generally will identify and apply the correct federal rule. Congress fully recognized the state courts' ability to "get it right," but intended to provide a remedy reserved for the extraordinary circumstance where the state courts fail to do so.[17] It is in that rare circumstance, where the state court decision itself demonstrates a departure from the governing rule clearly established by this Court that § 2254(d)'s prohibition against federal collateral relief is surmounted, and the federal court is free to apply the correct federal rule independently.

Williams' proposed definition of "contrary to clearly established Federal law," on the other hand, would allow the statute's exception to swallow the general rule. Under his interpretation of § 2254(d)(1), a federal court would continue to exercise "plenary" review over the question of whether the state court decision is "contrary to" precedent, and that would include independently deciding any claim invoking a rule "designed for the specific purpose of resolving the relevant claim." (Pet. Br. at 35). Williams

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[16] Williams ignores the fact that in this very case he claims that the Virginia Supreme Court identified the wrong rule for deciding his ineffective counsel claim. (Pet. Br. at 17-22).

[17] 142 Cong. Rec. S3446-S3447 (April 17, 1996) (statement of Sen. Hatch) ("Federal habeas review exists to correct fundamental defects in the law. After the State court has reasonably applied Federal law, it is hard to say that a fundamental defect exists."); 141 Cong. Rec. S7848 (June 7, 1995) (statement of Sen. Hatch); *id.* at S7843 (statement of Sen. Biden) (statute "dramatically restricting" federal court's power to say state court "got it wrong").

thus reads § 2254(d) as requiring de novo review for the vast majority of claims that are raised in federal habeas,[18] and merely codifying *Teague* to permit its continued application in those cases where it already applies.[19] By

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[18] Williams studiously avoids saying "de novo" review and instead uses the terms "plenary review" and "independent judgment." The terms he chooses, however, are indistinguishable from "de novo" review. *See Miller v. Fenton*, 474 U.S. 104, 115 (1985) (describing review of mixed questions as "plenary" and "independent"); *West*, 505 U.S. at 289 and n.6 (Thomas, J.) (describing review as plenary, independent and de novo); *id.* at 303 (O'Connor, J.) (reciting history of de novo review standard of mixed questions); *Salve Regina College v. Russell*, 499 U.S. 225, 240 (1991) (Rehnquist, C.J., dissenting) (equating terms "plenary," "independent" and "de novo," and distinguishing terms from "deferential.").

[19] Section 2254(d) does borrow terms used by the Court in the "new rule" analysis, and certainly preserves the "new rule" doctrine, but Congress did not merely "codify" *Teague*. Section 2254(d) does not codify *Teague*'s exceptions, and does not employ the "new rule" language Congress explicitly used elsewhere in AEDPA, *see* §§ 2244(b)(2)(A), 2254(e)(2) and 2264(a)(2), thereby "demonstrating that Congress was fully aware of, and able to invoke, the *Teague* doctrine, if it so chose." *See Green*, 143 F.3d at 874 n.1; *see also Lindh*, 521 U.S. at 330 (provision in Chapter 154 of AEPDA for application to pending cases creates negative implication that remainder of the Act is to be treated differently). Moreover, no member of Congress who addressed the bill suggested that it merely codified *Teague* and, as every member of Congress speaking for or against the bill was aware, the statute clearly was intended to change existing law substantially by providing a deferential standard of review. *See* 141 Cong. Rec. S7835 (June 7, 1995) (statement of Sen. Lott in favor); *id.* at S7838-S7839 (statement of Sen. Cohen, opposed); *id.* at S7841, S7842, S7843 (statement of Sen. Biden, opposed); *id.*, S7847 (statement of Sen. Specter, in favor); *id.* at S7848 (statement of Sen. Hatch, in favor); 142 Cong. Rec H2182 (Mar. 13, 1996) (statement of Rep. Hyde, in favor); *id.*, at H2183 (statement of Rep. McCollum, in favor); 142 Cong. Rec. H2248

enacting § 2254(d)'s general rule of prohibition, however, Congress clearly did not intend to codify the status quo. To the contrary, Congress intended to abolish de novo review of mixed questions of law and fact and to extend *Teague* to where this Court had declined to extend it in *West*.[20]

3. "An unreasonable application of" this Court's precedents focuses on the objective reasonableness of the state court's application of law to fact.

Williams illogically asserts that under § 2254(d)(1), state court applications of clearly established general rules that provide a framework for analyzing a particular type of generic claim must be reviewed de novo. He conveniently concludes that the rule established by this Court in *Strickland* for assessing ineffective counsel claims is just such a rule, and should be reviewed without any deference to the state court's decision. Such rules of general application, however, simply cannot be deemed to compel a particular result in every factual situation no matter how different from the facts in the case that established the normative rule. The standard of review this Court established in *Strickland* constitutes the "clearly established precedent" which state courts are compelled to apply, and a state court decision that fails to apply

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(Mar. 14, 1996) (statement of Rep. Chenoweth, opposed); *id.* at 2249 (statement of Rep. Hyde, in favor).

[20] *West* was discussed by the opponents of § 2254(d) who acknowledged that the proposed statute expressly contemplated deference to reasonable state court decisions applying federal law. *See* 141 Cong. Rec. S7843-S7844 (June 7, 1995) (statement of Sen. Biden); 142 Cong. Rec. S3440 (April 17, 1996) (statement of Sen. Moynihan).

Strickland to an ineffective counsel claim would be "contrary to" precedent. But a state court's application of the *Strickland* standard to the particular facts of a state prisoner's case is a matter that § 2254(d)(1) limits solely to a review for "unreasonableness."[21]

"Applications of clearly established Federal law" plainly means the state court's adjudication of mixed questions of law and fact. *See Thompson v. Keohane*, 516 U.S. 99, 112-113 (1995) (application of controlling legal standard to historical facts is mixed question); *Townsend v. Sain*, 372 U.S. at 309 n.6 ("mixed questions of fact and law . . . require the application of a legal standard to the historical fact determinations"); *Brown v. Allen*, 344 U.S. at 507 (Frankfurter, J., concurring) ("so-called mixed questions or the application of constitutional principles to the facts as found").[22] "Reasonableness" in the context of § 2254(d), as in the contexts of *Teague* and the qualified immunity cases, is an objective standard. *See O'Dell*, 521 U.S. at 156; *Stringer*, 503 U.S. at 237; *Wilson*, 119 S.Ct. at 1699. This Court, moreover, has defined "objective reasonableness" in terms of whether "a reasonable jurist"

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[21] Indeed, it would be impossible to conclude that the facts of a particular case were sufficiently similar to the facts in *Strickland* that a state court decision denying relief was "contrary to" *Strickland*. As this Court ruled in *Strickland*, the facts in that case did ***not*** warrant federal collateral relief. The lower federal courts consistently have reviewed *Strickland* claims for "unreasonable applications." *See, e.g., Vieux v. Pepe*, 1999 U.S. App. LEXIS 16656, *11 (1st Cir. 7/19/99); *Ashford v. Gilmore*, 167 F.3d 1130, 1134 (7th Cir. 1999); *Neeley*, 138 F.3d at 925.

[22] In the qualified immunity context, "reasonableness" under "clearly established" law requires review of the particular conduct of the state official. *See Wilson*, 119 S.Ct. at 1699-1701.

would have felt compelled by existing precedent to rule in the prisoner's favor. *See Graham*, 506 U.S. at 467; *Saffle*, 494 U.S. at 488; *see also Wilson*, 119 S.Ct. at 1699 ("objective reasonableness" in qualified immunity context defined as whether reasonable officer would understand that conduct violates "clearly established" right).

The analysis conducted by the Fourth Circuit in Williams' case – "whether reasonable jurists would all agree" that the state court's rejection of his ineffective counsel claim was "unreasonable" (JA 498) – is faithful, not only to the language of § 2254(d)(1), but also to the "objective reasonableness" standard of *Teague* and the qualified immunity cases. Williams' assertion that the standard is "self-nullifying" (Pet. Br. 44) is nonsense. Neither this Court, the Fourth Circuit nor the Warden ever has suggested that the mere existence of the state court decision denying relief is evidence of its reasonableness. *See Stringer*, 503 U.S. at 237.

D. The Fourth Circuit correctly applied § 2254(d) in Williams' case.

The Fourth Circuit rejected Williams' claim that his trial counsel were ineffective in failing to offer certain mitigating evidence, finding that the Virginia Supreme Court "reasonably applied clearly established law, as determined by the Supreme Court of the United States." (JA 508). The Court of Appeals applied § 2254(d) in the following manner:

> We recently interpreted subsection (1) to prohibit the issuance of the writ unless (a) the state court decision is in "square conflict" with Supreme Court precedent that is controlling as to law and fact or (b) if no such controlling decision exists, "the state court's resolution of a question of pure law rests upon an objectively

> unreasonable derivation of legal principles from the relevant [S]upreme [C]ourt precedents, or if its decision rests upon an objectively unreasonable application of established principles to new facts." "In other words, habeas relief is authorized only when the state courts have decided the question by interpreting or applying the relevant precedent in a manner that reasonable jurists would all agree is unreasonable."

(JA 497-498) (citations omitted). As demonstrated above, this interpretation of § 2254(d)(1) is faithful to both the language of the statute and Congress' intent to limit federal collateral review of claims which the state courts reasonably have rejected on the merits.

The Court of Appeals, moreover, not only upheld the reasonableness of the state court decision in Williams' case, it also independently concluded that his claim was without merit: "Like the Virginia Supreme Court, we readily conclude that Williams was not prejudiced in any way by counsel's actions." (JA 505). Thus, even under a de novo review of Williams' claim, the Fourth Circuit found that Williams had failed to demonstrate a reasonable probability that the jury would have imposed a life sentence if trial counsel had presented the evidence in question. Therefore, even if Williams' interpretation of the statute were correct, or even if the new statute never had been enacted, his ineffective counsel claim would fail under a de novo standard of review.

II. THE COURT BELOW CORRECTLY UPHELD THE STATE COURT'S REASONABLE APPLICATION OF *STRICKLAND v. WASHINGTON* AND *LOCKHART v. FRETWELL*.

Williams argues that the Fourth Circuit erred in upholding the state court's decision because the Virginia

Supreme Court concluded that he had failed to demonstrate prejudice as described in *Lockhart v. Fretwell in addition to* failing to satisfy the prejudice inquiry set out in *Strickland*. He also asserts that he has established *Strickland* prejudice, at least in terms of the hypothetical effect that his proffered mitigation evidence supposedly would have had on "one juror." The Fourth Circuit, however, correctly found that the state court reasonably concluded that Williams had failed to demonstrate a "reasonable probability of a different result" as required by *Strickland, and* that he failed to show that his trial was rendered fundamentally unfair or unreliable as a result of counsel's errors. Williams' "one juror" argument properly was rejected by the Court of Appeals because it misconceives *Strickland*'s concept of prejudice.

A. The Fourth Circuit and Virginia Supreme Court correctly identified the relevant "clearly established Federal law, as determined by the Supreme Court of the United States."

It cannot be disputed that *Strickland* and *Fretwell both* form part of this Court's clearly established precedent governing ineffective counsel claims. In *Strickland,* this Court announced the now familiar two-part standard by which such claims are measured. A prisoner must demonstrate both that his counsel's performance fell below an objective standard of reasonableness, *see* 466 U.S. at 688, *and* that he has been prejudiced by counsel's conduct. *Id.* at 694. *Strickland* also made clear that in order to show prejudice, a prisoner must demonstrate "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 687. To carry that burden the prisoner must "show that there is a

reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

In *Fretwell*, the Court merely restated the general Sixth Amendment principle that a showing of *Strickland* prejudice must implicate the reliability of the prisoner's trial. Fretwell had been convicted of capital murder and sentenced to death in 1985. Fretwell's trial counsel failed to object to the use of a particular statutory aggravator, an objection that the lower federal courts concluded would have prevented his death sentence under Eighth Circuit precedent existing at the time of trial, but which had been overruled by the time of the federal habeas proceeding. Fretwell claimed that trial counsel's error was prejudicial because the objection, if made at the time of trial, ultimately would have caused a different result. The district court and Eighth Circuit agreed with Fretwell and granted relief.

This Court reversed, rejecting the lower federal courts' strict outcome-based reading of *Strickland*:

> [A]n analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair, is defective. To set aside a conviction or sentence solely because the outcome would have been different but for counsel's error may grant the defendant a windfall to which the law does not entitle him.

Fretwell, 506 U.S. at 369-370. Because he was denied only "the chance to have the state court make an error in his favor," Fretwell's sentencing was neither unfair nor unreliable. *Id.* at 371. "Unreliability or unfairness does not result if the ineffectiveness of counsel does not deprive the defendant of any substantive or procedural right to which the law entitles him." *Id.* at 372.

Williams argues that *Fretwell* created a limited rule applicable only if the defendant asserts the denial of a right which the law does not recognize. He relies on Justice O'Connor's concurring opinion which would have limited the Court's holding to such an "unusual" case. *Id.* at 375 (O'Connor, J., concurring). The majority opinion, however, did not purport to define an exception to the *Strickland* prejudice inquiry. Rather, the Court merely clarified and applied the same Sixth Amendment focus upon reliability that from the outset has informed *Strickland*'s "prejudice" requirement.[23]

Strickland itself explicitly recognizes this fundamental principle. It requires that a prisoner demonstrate prejudice by showing "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." 466 U.S. at 687. In formulating the appropriate test for prejudice, the Court expressly considered how to assess the impact of counsel's errors on the fairness of the proceeding and the reliability of the result. *Id.* at 693 (rejecting "some conceivable effect" standard because not every error undermines reliability); *id.* at 694 (rejecting "more likely than not" standard because result

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[23] As *Fretwell* makes clear, assessing prejudice by reference to the effect of counsel's errors on the fairness and reliability of the trial is inherent in the Sixth Amendment. "Our decisions have emphasized that the Sixth Amendment right to counsel exists 'in order to protect the fundamental right to a fair trial.' " *Fretwell*, 506 U.S. at 368, *quoting Strickland*, 466 U.S. at 684. *See also Nix v. Whiteside*, 475 U.S. 157, 175 (1986) ("fairness of adversary proceeding" is "benchmark" of right to counsel); *United States v. Cronic*, 466 U.S. 648, 658 (1984) (Sixth Amendment not implicated without effect of conduct on reliability of trial); *United States v. Morrison*, 449 U.S. 361, 364 (1981) (right to counsel "meant to insure fairness" in criminal proceeding).

of proceeding can be unreliable, and proceeding itself unfair, even if outcome cannot be shown to have been affected). The Court concluded that the appropriate standard, borrowed from the test for materiality of undisclosed exculpatory information, requires a showing of "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*[24] The "reasonable probability" inquiry does not supplant the overriding requirement that counsel's errors be shown to have affected the fairness of the trial and the reliability of the result. Indeed, after rejecting the prisoner's claims, *Strickland*'s concluding lines recite that "[m]ore generally" the prisoner had not shown "that the justice of his sentence was rendered unreliable" and that his sentencing was not "fundamentally unfair." *Id.* at 700.[25]

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[24] The fairness and reliability of the proceedings also is the concern underlying the materiality standard that the Court borrowed for use in *Strickland*. *See United States v. Agurs*, 427 U.S. 97, 108 (1976) (prosecutor's constitutional duty not violated unless omission in producing information denied the defendant a fair trial); *United States v. Valenzuela-Bernal*, 458 U.S. 858, 872-873 (1982) (materiality rule designed to protect "fundamental fairness essential to the very concept of justice").

[25] Justice O'Connor's observation in her *Fretwell* concurrence that the Court's specific holding will not affect the prejudice inquiry under *Strickland* in the "vast majority of cases," *see Fretwell*, 506 U.S. at 373 (O'Connor, J., concurring), is undeniably accurate. Indeed, it did not affect the Virginia Supreme Court's explicit finding that Williams had failed to demonstrate prejudice under *Strickland*. The *Strickland* prejudice inquiry was designed for general application in cases where prejudice could not be presumed. *See Strickland*, 466 U.S. at 693. *Fretwell* is a reminder, however, that *Strickland*'s prejudice inquiry must always be grounded on the effect of counsel's alleged error on the fairness of the trial or the reliability of the result.

B. The Virginia Supreme Court did not characterize Williams' claim as seeking a "windfall," but correctly recognized that the Sixth Amendment does not protect a defendant's "right" to a malfunction of the trial process.

Williams argues that the Virginia Supreme Court's mere reference to the word "windfall" must mean that the state court somehow determined that Williams had "no right to submit the neglected mitigation evidence." (Pet. Br. at 21). Williams' argument, however, is premised entirely on his misreading of the state court opinion. The Virginia Supreme Court's references to *Fretwell* do not even remotely suggest that Williams was not entitled to present mitigating evidence or that he had satisfied the *Strickland* prejudice inquiry.[26]

It is true, of course, that the word "windfall" appears once in the Virginia Supreme Court's opinion, within a preliminary summary of the applicable law. (JA 438). Williams ignores, however, what the Virginia Supreme

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[26] The Virginia Supreme Court consistently has applied *Strickland* as the standard for ineffective counsel claims since 1984. *Virginia Department of Corrections v. Clark*, 318 S.E.2d 399, 403-404 (Va. 1984). *See Pender v. Angelone*, 514 S.E.2d 756, 757 (Va. 1999); *Curo v. Becker*, 493 S.E.2d 368, 370 (Va. 1997); *Strickler v. Murray*, 452 S.E.2d 648, 651 (Va. 1995); *Murray v. Griffith*, 416 S.E.2d 219, 221 (Va. 1992); *Bowles v. Nance*, 374 S.E.2d 19, 20 (Va. 1988); *Epperly v. Booker*, 366 S.E.2d 62, 67 (Va. 1988); *Correll v. Commonwealth*, 352 S.E.2d 352, 361 (Va. 1987); *Frye v. Commonwealth*, 345 S.E.2d 267, 287 (Va. 1986). In *Pender*, decided after Williams' case, the state court mentioned *Fretwell* solely in the context of emphasizing the interests of fairness and reliability which underlie the concept of *Strickland* prejudice, without any mention of a "windfall." *See Pender*, 514 S.E.2d at 757.

Court expressly concluded in the remainder of its opinion. The state court analyzed Williams' claim under the *Strickland* prejudice inquiry and clearly and repeatedly stated its conclusion that Williams had failed to establish "a reasonable probability of a different result." (JA 441, 443, 444). This express determination that Williams had failed to satisfy *Strickland*'s prejudice standard precludes any possibility that the state court applied the wrong standard. To the contrary, the Virginia Supreme Court correctly rejected the state habeas judge's erroneous "per se prejudice" approach, which mistakenly had concluded that, if mitigating evidence exists and is not offered into evidence, "this amounts to prejudice." (JA 444). Indeed, *Strickland* clearly prohibits a finding of prejudice based solely on the fact that evidence existed and was not presented. 466 U.S. at 700.

The state court also correctly criticized Williams' assertion that he could demonstrate prejudice merely by showing a reasonable probability that at least "one juror" considering his proffered mitigation evidence would have been persuaded to "hold-out" for a life sentence, thereby deadlocking the jury and ultimately resulting in a life sentence by default.[27] (JA 441). As demonstrated below (Argument II C), Williams' Sixth Amendment right to the effective assistance of counsel does not encompass a supposed "right" to a non-decision or to any other

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[27] The state court's rejection of Williams' "one juror" claim, however, never suggested that Williams had established a "reasonable probability" of a different outcome. Indeed, the very next paragraph of the Virginia Supreme Court's opinion concludes that Williams had not made that showing, and therefore had failed to satisfy the *Strickland* prejudice requirement. (JA 441).

similar malfunction of the trial process. The state court's reliance on *Fretwell*, therefore, was entirely appropriate.

That the Virginia Supreme Court applied *Fretwell in addition to Strickland*'s prejudice inquiry certainly does not entitle Williams to collateral relief. The state court's reliance upon *Fretwell* is entirely consistent with the *Strickland* standard which the Virginia Supreme Court accurately stated and correctly applied to Williams' claim.[28]

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[28] Decisions from every federal circuit, like that of the Virginia Supreme Court, have treated *Fretwell*'s emphasis on reliability and a fair trial as a mere explanation or clarification of *Strickland* prejudice. *See Scarpa v. Dubois*, 38 F.3d 1, 16 (1st Cir. 1994) ("We caution, however, that the analysis does not focus solely on outcome determination, but also takes into prominent consideration 'whether the result of the proceeding was fundamentally unfair or unreliable.' "), *cert. denied*, 513 U.S. 1129 (1995); *Carey v. United States*, 50 F.3d 1097, 1101 (1st Cir. 1995) ("Prejudice incorporates more than outcome determination; we also must determine whether 'the result of the proceeding was fundamentally unfair or unreliable' "); *United States v. Prince*, 110 F.3d 921, 925 (2d Cir.) (quoting *Fretwell*, "analysis focusing solely on mere outcome determination . . . is defective"), *cert. denied*, 522 U.S. 872 (1997); *Flamer v. Delaware*, 68 F.3d 710, 728 (3d Cir. 1995) (*Fretwell*'s fundamentally unfair or unreliable standard "clarified the meaning of prejudice under *Strickland*"), *cert. denied*, 516 U.S. 1088 (1996); *Westley v. Johnson*, 83 F.3d 714, 719 (5th Cir. 1996) (in *Fretwell*, "the Supreme Court further narrowed the prejudice inquiry"), *cert. denied*, 519 U.S. 1094 (1997); *McQueen v. Scroggy*, 99 F.3d 1302, 1311 (6th Cir. 1996) ("Notwithstanding the outcome-determinative focus in *Strickland*, the Court in *Lockhart* . . . clarified that 'an analysis focusing on mere outcome determination . . . is defective.' "), *cert. denied*, 520 U.S. 1257 (1997); *Durrive v. United States*, 4 F.3d 548, 550 (7th Cir. 1993) (*Fretwell*'s rejection of "mere outcome determination" was rejection of "equation between causation and prejudice.");

C. The Fourth Circuit correctly rejected Williams' "one juror" prejudice standard.

Virginia law provides that "[i]n the event the jury cannot agree as to the penalty, the court shall dismiss the jury, and impose a sentence of imprisonment for life." Va. Code § 19.2-264.4(E).[29] Williams argues that a reasonable probability of a different sentencing result can be established by showing that at least "one juror" would have held out for a life sentence, thus deadlocking the jury and resulting in a life sentence by operation of law. The

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Whitmore v. Lockhart, 8 F.3d 614, 622 (8th Cir. 1993) (quoting *Fretwell*, "an analysis focusing on mere outcome determination . . . is defective"); *United States v. Palomba*, 31 F.3d 1456, 1461 (9th Cir. 1994) ("Under the Court's recent explication of *Strickland*'s second prong, a prejudice analysis 'focusing solely on mere outcome determination . . . is defective.' "); *United States v. Kissick*, 69 F.3d 1048, 1055 (10th Cir. 1995) ("[A] court may not set aside a conviction or a sentence solely because the outcome would have been different absent counsel's deficient performance. Instead, . . . a defendant must demonstrate that counsel's performance rendered the proceeding "fundamentally unfair or unreliable."); *Hayes v. Alabama*, 85 F.3d 1492, 1496 (11th Cir. 1996) ("Hayes must 'show that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.' "), *cert. denied*, 520 U.S. 1123 (1997). This unanimous understanding of *Fretwell* among the lower federal courts establishes the "objective reasonableness" of the Virginia Supreme Court's decision.

[29] The overwhelming majority of States with capital punishment follow the same practice. *See Jones v. United States*, 119 S.Ct. 2090, 2116-2117 (1999) (Ginsburg, J., dissenting) (citing report indicating that 25 states follow rule that jury's inability to agree on penalty produces life sentence). Of course, the rule Williams proposes cannot be limited solely to capital sentencings. *See Strickland*, 466 U.S. at 695 (same prejudice rule applies in capital and non-capital cases). It would apply with the same force when unanimity is required for **any** jury verdict.

assertion that *Strickland* prejudice can be demonstrated by speculating on the potential effect of omitted mitigation evidence on "one juror," however, misconceives the *Strickland* prejudice standard and indeed would replace *Strickland*'s stringent test with an inappropriately weak and unmanageable standard.

Strickland focuses on the *decision* of a trier of fact, either as to guilt or as to sentence. This Court never has suggested that the *Strickland* prejudice inquiry properly assesses the possibility of a jury's failure to decide, or that the Sixth Amendment right to effective counsel protects a defendant's "right" to a hung jury. *See United States v. Sawyers*, 423 F.2d 1335, 1341 (4th Cir. 1970) ("A defendant has no 'right' to either an irrational verdict or a hung jury. . . . When a defendant occasionally benefits, if he does, from a hung jury, he is getting not what he is entitled to have but something less."). As this Court recently has reaffirmed, "the very object of the jury system is to secure unanimity by a comparison of views, and by arguments among the jurors themselves." *Jones v. United States*, 119 S.Ct. at 2099, *quoting Allen v. United States*, 164 U.S. 492, 501 (1896). The Court rejected any requirement that a jury be instructed as to the consequences of a failure to decide because it "might well have the effect of undermining" the strong interest in "having the jury express the conscience of the community on the ultimate question of life or death." *Jones*, 119 S.Ct. at 2099, *quoting Lowenfield v. Phelps*, 484 U.S. 231, 238 (1988).

The *Strickland* standard of prejudice thus protects a defendant's Sixth Amendment right to a fair and reliable ***decision*** by the factfinder, as well as the parties' interest in a reliable ***verdict***, by requiring that the prisoner must show the reasonable probability of a different *decision* but for counsel's alleged errors:

> When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, *the factfinder* would have had a reasonable doubt respecting guilt. When a defendant challenges a death sentence such as the one in this case, the question is whether there is a reasonable probability that, absent the errors, *the sentencer – including an appellate court to the extent it independently reweighs the evidence* – would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.

466 U.S. at 695. *See also Strickler v. Greene*, 119 S.Ct. 1936, 1955 (1999) (in *Brady* context, prisoner had not shown "reasonable probability that the jury would have returned a different verdict"); *Kyles v. Whitley*, 514 U.S. 419, 453 (1995) (the prejudice question asks "whether we can be confident that the jury's verdict would have been the same"); *United States v. Bagley*, 473 U.S. 667, 682 n.13 (1985) ("a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt").

Strickland's prejudice analysis, moreover, does not contemplate a spectrum of jurors each applying his or her own individual propensities for harshness or leniency. To the contrary, the Court made clear that the inquiry into the effect of errors by a prisoner's own counsel demands a completely objective assessment:

> The assessment of prejudice should proceed on the assumption that the decision maker is reasonably, conscientiously, and impartially applying the standards that govern the decision. It should not depend on the idiosyncrasies of the particular decision maker, such as unusual propensities toward harshness or leniency.

466 U.S. at 695. Williams argues that he seeks only the "usual" variations that might appear on a given jury.[30] (Pet. Br. at 23). But an assumption that any jury necessarily includes at least "one juror" who is more predisposed to leniency simply invites reviewing courts to assess *Strickland* prejudice based on considerations having no proper place in an objective analysis.[31]

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[30] Williams mistakenly relies on decisions in contexts far different from the type of review involved in the *Strickland* prejudice inquiry. In *Adams v. Texas*, 448 U.S. 38, 46 (1980), this Court observed that jurors "exercise a range of judgment and discretion," but did so only in the context of considering whether Texas violated the rule in *Witherspoon v. Illinois*, 391 U.S. 510 (1968), by excluding particular jurors who said they would be "affected" in their deliberations by the possibility of the death penalty. Similarly, in *Mills v. Maryland*, 486 U.S. 367 (1988), and *McKoy v. North Carolina*, 494 U.S. 433 (1990), the Court ruled that the principle that a sentencer may not be precluded from giving effect to all mitigating evidence was violated by instructions and verdict forms that required unanimity before particular mitigation factors could be considered. That Eighth Amendment principle, however, simply has nothing to do with *Strickland*'s Sixth Amendment inquiry regarding whether a petitioner is entitled to relief on the basis of his trial counsel's alleged errors absent evidence that the errors had an adverse impact on the collective decision reached by the jury. *See McKoy*, 494 U.S. at 450 n.5 (Blackmun, J., concurring) (drawing distinction between situation where lack of unanimity prevents any juror from considering evidence thought to be "mitigating" and situation where lack of unanimity merely results in hung jury).

[31] The contrary rule that Williams would have this Court adopt is unworkably imprecise. He offers no explanation as to how a reviewing court would divine the views of the most sympathetic juror, or how to assess whether there is a reasonable probability that such presumed sympathetic tendencies might cause the hypothetical juror to choose to "hold-out" and prevent a decision by the jury. As Williams has

In *Harrington v. California*, 395 U.S. 250 (1969), the Court expressly rejected a harmless error analysis premised on the same assumption Williams makes – that some, or even one, juror can be persuaded more easily than his colleagues:

> It is argued that we must reverse if we can imagine a single juror whose mind might have been made up because of Cooper's and Bosby's confessions and who otherwise would have remained in doubt and unconvinced. We of course do not know the jurors who sat. Our judgment must be based on our own reading of the record and on what seems to us to have been the probable impact of the two confessions on the minds of an average *jury*.

395 U.S. at 254 (emphasis added). *See also Boyde v. California*, 494 U.S. 370, 380 (1990) ("reasonable likelihood" standard for assessing how jury interpreted instruction "better accommodates the concerns of finality and accuracy than does a standard which makes the inquiry dependent on how a single hypothetical reasonable juror could or might have interpreted the instruction. . . . Jurors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way lawyers might."). This reasoning applies with at least equal force in the context of *Strickland*'s inquiry regarding whether a petitioner has been prejudiced by his trial counsel's alleged errors.

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acknowledged, *Strickland* was meant to establish an "administrable standard." (Pet. Br. at 20). Williams' "rule" would provide no standard at all.

D. The Fourth Circuit correctly upheld the Virginia Supreme Court's reasonable application of Strickland v. Washington.

Williams insists that his case should have been considered under *Strickland* only, but makes no plausible argument that the Virginia Supreme Court's references to *Fretwell, in addition to* the express disposition of his claim under the *Strickland* prejudice standard, constitutes the type of fundamental error contemplated by § 2254(d)(1). Obviously, the state court's express finding that Williams had failed to demonstrate a reasonable probability of a different result (JA 441) was in no sense rendered "unreasonable" by the fact that the state court also generally concluded that Williams' trial was fair or his sentence reliable.

Given the evidence concerning the circumstances of Williams' crime and his record of other violent criminal activity, the evidence that his trial attorneys failed to present "would barely have altered the sentencing profile presented to the [jury]." *See Strickland*, 466 U.S. at 700. At the time of the capital crime, Williams was "in the midst of a crime spree, preying upon defenseless individuals." (JA 442). Within four months after the Stone murder in November 1985, Williams stabbed and robbed an elderly man in his home, after starting a fire on the victim's porch to lure him outside, and savagely beat an elderly woman causing brain injuries that left her in a "vegetative state" with no hope of recovery.

Williams' optimistic argument that he has presented a compelling case of mitigating evidence simply will not survive scrutiny. Williams stresses the circumstances of his upbringing and evidence of abuse and neglect, some of it dating back thirty years, as evidence that could have

been offered to provide the jury with "a basis for affording him compassion." Williams, however, was not a child, but a thirty-one-year-old man when he murdered Mr. Stone, and his lack of compassion for his array of elderly victims was abundantly evident in the case presented at sentencing. Indeed, Williams' own court-appointed psychiatrist, who was aware that Williams had had a "difficult childhood," considered such evidence to be a "two-way sword" that just as easily could be used "as an argument for non-mitigation." (JA 261, 277). Indeed, this Court has recognized that such evidence can work to the defendant's disadvantage, *see Penry*, 492 U.S. at 324 ("Penry's mental retardation and history of abuse is . . . a two-edged sword. . . . "), and it undoubtedly would have if it had been presented at Williams' trial. At a bare minimum, evidence of Williams' upbringing would have prompted the prosecution to present the records of Williams' extensive juvenile criminal conduct and repeated incarcerations. The Virginia Supreme Court noted fourteen juvenile offenses committed by Williams from 1966 to 1975 that were not presented to the jury, and clearly such additional proof of Williams' lifelong criminal career would have been harmful to his case. (JA 442-443).

Williams claims the omitted evidence would have demonstrated that he would not be violent in prison if incarcerated for life, relying on prison records and testimony of prison guards attesting to his good behavior during prior incarcerations, and the opinions of the Commonwealth's experts.[32] The evidence already before the

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[32] Williams' assertion that his potential dangerousness in prison provided the "key to the Commonwealth's theory for death" is entirely wrong. Williams' counsel argued that the defendant would be "locked up for the rest of his life." (JA 138).

jury, however, established that, since his prior incarceration, Williams had assaulted, stabbed, robbed and killed, he had set a fire while in jail awaiting trial, and had expressed his urges to choke or hit other prisoners in the jail. (JA 81). Moreover, the state habeas judge did not credit or cite the expert opinions as persuasive mitigating evidence, and elsewhere concluded that the evidence of Williams' criminal history "alone was more than sufficient to support" the jury's future dangerousness finding.[33] (JA 426).

The state habeas judge found the testimony of Williams' ex-wife, daughter and a friend, Bruce Elliott, to be the only proffered character evidence "worthy of a jury's consideration."[34] (JA 423). The same state habeas judge, however, properly credited defense counsel's deliberate strategy decision to forego additional character witnesses

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Williams would have been eligible for parole on a life sentence in "about twelve and a half years." (JA 138). Despite the invitation presented by defense counsel's misleading argument, the prosecutor never suggested that a death sentence was warranted because of Williams' dangerousness in prison. He argued only Williams' demonstrated dangerousness to society in general. (JA 143-149).

[33] Williams not only continues to rely on expert opinions which the state habeas judge never accepted or relied upon, he also asserts evidence concerning the effects of "prenatal alcohol exposure" which the state court expressly found that Williams had **not** established. (JA 387). Williams cannot overcome the state court's findings. *See* § 2254(e)(1) (state court factual findings must be presumed correct and may be overcome only by "clear and convincing evidence").

[34] The state habeas judge inaccurately referred to the "testimony" of Williams' friend Bruce Elliott as the "most persuasive mitigating evidence" (JA 400), despite the fact that Elliott's "testimony" consists only of his affidavit, which never was subjected to cross examination. (JA 563-566).

because of the devastating effect of the prosecutor's cross-examination of the two character witnesses who *did* testify, but thought more evidence should have been offered "for whatever it was worth." (JA 401). The Virginia Supreme Court reasonably found that the proffered testimony of the witnesses showed, at most, that Williams was viewed as non-violent by his family and friends, an assumption that was "belied by the four month crime spree," and that the proffered mitigating evidence "barely would have altered the profile of this defendant," and "might even have been harmful to his case." (JA 443). The Fourth Circuit agreed with the Virginia Supreme Court's *Strickland* analysis that the unaffected evidence of Williams' dangerousness was "simply overwhelming," and that the evidence as a whole "painted Williams as a recidivist who was likely to commit future offenses." (JA 505). The Court of Appeals thus concluded that the state court decision rejecting Williams' claim was not unreasonable. (JA 505-506). The rejection of Williams' claim under the *Strickland* prejudice standard by both a unanimous Virginia Supreme Court and a unanimous Fourth Circuit clearly represents a reasonable application of this Court's precedent.

E. Defense counsel performed within the range of reasonable professional competence.

Because the Virginia Supreme Court and the Fourth Circuit both concluded that Williams' claims failed to meet *Strickland*'s prejudice requirement, neither court reached the performance prong of the governing two-part standard. *See Strickland*, 466 U.S. at 697 ("If it is easier to dispose of an ineffectiveness claim on the ground of lack

of sufficient prejudice . . . that course should be followed."). Both courts simply "assumed without deciding" that Williams had established the performance prong. (JA 439, 443, 501). That assumption, however, should not be misconstrued as a finding of deficient performance.

Assessing counsel's performance from the circumstances presented at the time of trial, *see Strickland*, 466 U.S. at 689, counsel did not act unreasonably in failing to discover or present the evidence that Williams later proffered during the state collateral proceeding.[35] In *Strickland*, this Court found defense counsel effective in circumstances certainly more "egregious" than those presented here. *See* 466 U.S. at 672-674. *See also Burger v. Kemp*, 483 U.S. 776, 795 (1987) (counsel reasonably determined not to present any mitigation evidence).

Thus, Williams' failure, much like that of the prisoner in *Strickland*, is a "double failure," 466 U.S. at 700, and therefore he is not entitled to relief.

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[35] Counsel reasonably sought information from Williams' family members, but they never suggested that any helpful evidence existed concerning Williams' upbringing. (JA 208, 227, 235). They presented character evidence to show that Williams had some redeeming qualities, *and the state habeas judge expressly found that counsel made a tactical decision not to call additional witnesses*. (JA 400). The state court also found that counsel were reasonable in their strategy of avoiding having their psychiatric expert testify that Williams is dangerous and in asking the jury to spare Williams because he had turned himself in to the authorities and confessed. (JA 406, 408).

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

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